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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1643

FRANK SCHULTE, WM. J. SCHULTE and FIRST NATIONAL BANK & TRUST COMPANY OF OKLAHOMA CITY, as Trustee for Annette Vogt Gravitt and Jeanette Vogt Bollman,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF FOR RESPONDENT IN OPPOSITION

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July, 1972

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Oklahoma appears in Appendix A of petitioners' Petition for Writ of Certiorari and is reported in 494 P.2d 638 and therefore is not repeated herein.

JURISDICTION

This Court does not have jurisdiction since the petitioners did not present a Federal question in their evidence in the trial court, nor in their original brief in the Oklahoma

Supreme Court, but presented a Federal question for the first time in their Petition for Rehearing to the Oklahoma Supreme Court. The judgment of the Oklahoma Supreme Court is on independent, non-federal grounds, sufficiently broad to sustain the decision.

QUESTIONS PRESENTED

1. Is the measure of damages in a condemnation proceeding in Oklahoma the fair market value at the date of taking and may the jury speculate as to what such value might be?

2. Is the burden upon one seeking admission of evidence to properly offer such evidence, and does the trial court have any burden to perfect such offer for one who does not properly offer same?

3. May a petitioner who does not state a Federal question in his brief to the Appellate Court raise a Federal question for the first time on Petition for Rehearing?

STATUTES INVOLVED

As conceded by petitioners in their petition before this Court there are no Oklahoma statutory provisions directly involved. Specifically no statutory provisions were cited by petitioners in the trial court or before the Oklahoma Supreme Court as being either directly or indirectly involved.

STATEMENT

In this action petitioners seek to vacate the final adjudication of condemnation proceedings concerning lands owned by them prior to the condemnation for Will Rogers World Airport expansion purposes by The City of Oklahoma City, respondent herein. At the trial of this case, a District Court jury determined the value of the subject property to be below the amount fixed by the court-appointed commissioners which resulted in a deficiency judgment in favor of the respondent.

Petitioners attempted to introduce certain evidence during the trial which was excluded by the court. One witness, Berwin, was examined as to values (C-M. 255). Respondent objected to the answer as not being responsive, but was overruled by the court (C-M. 256) contrary to petitioners' recollection (Petition for Writ, page 4). Petitioners then attempted to introduce their Exhibits 5 through 16 (C-M. 256, 257). The titles of these documents or reports as they were referred to, are lengthy and are listed in the Index of Exhibits (C-M. v.). Their titles reflect that they cover information about all Oklahoma City Airports and not just Will Rogers World Airport. Petitioners conceded that the maps of the Will Rogers World Airport property were the only portion of the records that were relevant (C-M. 257). Petitioners in their offers of proof (C-M. 257, 258, 308, 310, 311 and 312) did not attempt to separate the maps in question and make a separate offer of proof by offering copies of just the maps.

The court refused the admission of the Exhibits 5 through 16 in their complete form in which they were sub-

mitted. Petitioners' Exhibits 17 and 18 were also refused by the court. These exhibits were resolutions of necessity which had been passed by the Council of The City of Oklahoma City. Exhibit 17 is a resolution attached by respondent to its original petition. Petitioners contend (C-M. 309) that Exhibit 17 had not been attached to the petition by respondent and was not part of the record. C-M. 15 reflects the District Court Clerk's stamp showing that the instrument had been filed with and at the same time as the original petition of the respondent.

Exhibit 18 is a resolution which contained a cover letter from one of the City attorneys to the City Manager which was not a part of the resolution and which was objected to by respondent (C-M. 309) and sustained by the court. There was no attempt by petitioners to offer Exhibit 18 separately and without the attachment.

From the jury verdict the petitioners appealed to the Oklahoma Supreme Court. Thereafter the case was reassigned to the Court of Appeals, an intermediate three-Judge Appellate Court. From a decision of the Court of Appeals which reversed the District Court, the respondent sought certiorari to the Oklahoma Supreme Court. Thereafter on January 19, 1972, the Supreme Court of Oklahoma reversed the Court of Appeals and remanded the case to the trial court with instructions to enter judgment against the petitioners.

The Supreme Court of the State of Oklahoma, in reversing the Court of Appeals, found it unnecessary to discuss all of the errors of law raised by respondent City. Justice Lavender's opinion, concurred in by all Justices, does not involve Federal questions.

ARGUMENT

This case involves condemnation procedures in the State of Oklahoma. On Petition for Rehearing before the Supreme Court of Oklahoma, the petitioners tardily alleged a Federal question.

No Federal question is involved since there is no allegation that the provisions of the Oklahoma Constitution relating to condemnation actions are contrary to or in any manner contravene the United States Constitution.

Although the Court of Appeals ruled in favor of petitioners, the Oklahoma Supreme Court unanimously reversed the trial court and directed that the jury verdict in the trial court be reinstated, deciding the case entirely on local law and without reference to any Federal question. In its decision the Oklahoma Supreme Court found it unnecessary to consider all of the allegations of error raised by the respondent but decided the case basically upon a review of the record as to evidence admissibility and the introduction of certain evidence allowed by the trial court.

I.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

Petitioners in their Petition for Rehearing to the Oklahoma Supreme Court allege that the court's opinion is in conflict with the Constitution of the United States alleging for the first time any possible Federal question; however, other than in their Petition for Writ before this Court and even then indirectly, petitioners have not pre-

viously contended that any provisions of the Oklahoma Constitution were contrary to or in conflict with similar provisions of the United States Constitution.

This case was litigated and decided entirely on local law, without reference to rights claimed under the Constitution of the United States.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway Company,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510:

> "1. The asserted right to just compensation for improvements in eminent domain proceedings does not necessarily present a question under U. S. Const., 14 Amend., so as to sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state, denying such right, where due process of law, including just compensation for property taken for public purposes, is guaranteed by the state laws and Constitution, and the case might well have been litigated wholly upon local law."

Southwestern Bell Telephone Company v. *State of Oklahoma,* 303 U.S. 206, 82 L.Ed. 751, 58 S.Ct. 528:

> "2. It is essential to the jurisdiction of the Supreme Court of the United States in reviewing a decision of a state court that it must appear affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to the determination of the cause, that the Federal Question was actually decided, or that the judgment as rendered could not have been given without deciding it."

Ward v. *Board of County Commissioners of Love County, Oklahoma*, 253 U.S. 17, 64 L.Ed. 751, 40 S.Ct. 419:

> "A judgment of a state court, which is put on independent nonfederal grounds broad enough to sustain it, cannot be reviewed when such grounds are not plainly untenable."

Hooker v. *City of Los Angeles*, 188 U.S. 314, 47 L.Ed. 487, 23 S.Ct. 395:

> "2. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.
>
> "3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument."

The Oklahoma Supreme Court decided this case on independent non-federal grounds which are sufficiently broad to sustain the decision.

II.

PETITIONERS HAVE WAIVED THEIR RIGHT TO URGE A FEDERAL QUESTION.

In the trial court the petitioners presented their case based upon Oklahoma condemnation law without any specific reference to any article or section of the United States Constitution. No Federal question was raised.

Consolidated Turnpike Company v. *Norfolk & Ocean View Railway,* 228 U.S. 326, 57 L.Ed. 857, 33 S.Ct. 510, at page 512 of the Supreme Court Reporter, the United States Court holds:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. Cronwell v. Randell, 10 Pet. 368, 398, 9 L.ed. 458, 470; Simmerman v. Nebraska, 116 U.S. 54, 29 L.ed. 535, Sup.Ct.Rep. 1186; Erie R. Co. v. Purdy, 185 U.S. 148, 153, 46 L.ed. 847, 850, 22 Sup.Ct. Rep. 605."

Beck v. *Washington,* 369 U.S. 541, 8 L.Ed.2d 98, 82 S.Ct. 955:

> "12. The Supreme Court of the United States cannot entertain a question not raised in the state court below nor actually decided by that court."

16 Am.Jur.2d, *Con. Law,* Section 115, states in part:

> ". . . An appellant who fails to argue a constitutional contention in his brief, merely setting it forth in one sentence, is considered to have abandoned or waived such contention. . . ."

The opinion of Justice Lavender for the Oklahoma Supreme Court (Petitioners' Petition for Writ—Appendix A) decided the case on adequate non-Federal grounds. The first discussion by petitioners of the United States Constitution or a Federal question was in their Petition for Rehearing.

St. Louis & San Francisco Railroad Company v. *Shepherd*, 40 Okla. 589, 139 Pac. 833, on appeal, 240 U.S. 240, 60 L.Ed. 622, 36 S.Ct. 274, holds:

> "1. A Federal question first set up and asserted in a petition for rehearing after the judgment in the trial court had been affirmed by the highest court of the state will not support the jurisdiction of the Federal Supreme Court on writ of error, where the petition was not entertained, but was denied, without passing on the Federal question thus tardily raised."

Bilby v. *Stewart*, 55 Okla. 767, 153 Pac. 1173, on appeal, 246 U.S. 255, 62 L.Ed. 701, 38 S.Ct. 264, states:

> "Where plaintiffs in error did not raise any federal question until their second petition for rehearing, after the state Supreme Court had affirmed a judgment on an adequate nonfederal ground, the question was raised too late for consideration on writ of error sued out from the United States Supreme Court."

The Oklahoma Supreme Court denied the Petition for Rehearing without deciding the tardily alleged Federal questions, therefore, petitioners are precluded from urging a Federal question.

III.

THE DECISION IS CLEARLY CORRECT.

The Oklahoma Supreme Court thoroughly searched the record and at page 643 of its opinion reported in 494 P.2d 638, stated:

> "The trial court did not refuse to allow any witness for the landowners to testify as to the fair market value of this property as it would have been at the time of the taking if there had been no threat of condemnation and the property was not being taken. Their opinions as to value were given, and received in evidence, on that basis, without objection and without any evidence of any public announcement, or public knowledge, of a plan by the city to acquire this property, by condemnation if necessary, for airport expansion purposes. We find no offer by the landowners of any testimony as to such public announcement of public knowledge. In the circumstances, no evidence of such a public announcement or public announcement was needed.
>
> "If any offer of proof made by the landowners can be construed as an offer of evidence of such a public announcement, or public knowledge, of such a plan by the city, the rejection of such evidence was not prejudicial to the landowners."

As to the offer of proof made by petitioners, however, Oklahoma law follows the most practical rule by requiring counsel to make separate offers of proof. The City again cites the leading case of *Pittenhouse* v. *Johnson*, 17 P.2d 457, which states:

> "Where an offer of proof is made as a whole, and some of the facts are admissible, and others inadmis-

sible, the court is not bound to separate it and admit such parts as are competent, though, in its discretion, it may do so. The refusal to do so, however, *will not be error.*" (Emphasis supplied.)

That these were matters within the sound discretion of the trial judge, it is again urged.

IV.

THERE IS NO CONFLICT OF DECISION.

The cases cited by petitioners in their Proposition Number 1 of the petition deal with a depressed market. In the instant case, however, as was evident from the testimony, the area in question was an area of rising land values being traded in by speculators and developers. The announcement of the airport expansion, if anything, seemingly boosted the price. The petitioners' witness, Drews, testified to-wit:

"Q. Now when did you first become familiar with the values of the farms in this area?

A. Due to the rapid expansion, oh, along about 1959 and '60. I was farming a considerable amount of land out there and the land was sold for development purposes" (C-M. 174).

The Supreme Court of Oklahoma in an early decision, in considering the question of speculation in determining fair market value in the case of *Blincoe* v. *Choctaw, O. & W. R. Co.*, 16 Okla. 286, 83 Pac. 903, approved the following jury instruction:

"The law does not permit you to fix speculative, boom, or fancy values upon the property in contro-

versy, but the law requires you to determine the reasonable market salable value of the property if the owner was offering to sell on usual terms and a purchaser desired to pay—is not erroneous because of the use of the word 'boom' as here used; the court having in this and other instructions been careful to advise and instruct the jury that the market value as contradistinguished from a purely imaginative or speculative value must be their basis for the assessment of damages."

The value of land in the entire area increased from 1959 through 1963 as was testified to by the appraisers for both petitioners and respondent. If anything, evidence of increase due to the announcement of airport expansion plans should not have been allowed if same had been objected to by respondent.

Petitioner has cited *United States* v. *Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336, as being in conflict with the decision of the Oklahoma Supreme Court. There is no conflict however. In the instant case there was an increase in value which, applying the principle of the *Miller* case, if evidence had been introduced concerning a public announcement occurring several years prior to the taking, the landowner should not have benefited from an increase in value of the property that had occurred prior to the date of taking between the years 1959-1963.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July, 1972